

1994

Liberalism and Natural Law Theory

John M. Finnis

Notre Dame Law School, john.m.finnis.1@nd.edu

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship



Part of the [Legal History Commons](#), and the [Natural Law Commons](#)

Recommended Citation

John M. Finnis, *Liberalism and Natural Law Theory*, 45 Mercer L. Rev. 687 (1993-1994).

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/520

This Lecture is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Liberalism and Natural Law Theory

by John Finnis*

I.

I shall argue, in the course of this lecture, that the title I gave myself is a bad one, one that sets a bad example. "Liberalism," like "conservatism" and "socialism," is too local, contingent and shifting a term to deserve a place in a general theory of society, politics, government and law. So I had better say at once which proposition or set of propositions I, on this occasion, was gesturing towards with the word "liberalism," out of all the many propositions, often conflicting, which have been called "liberal." What I had in mind was the thesis that government and law should be *limited* in their range of application, that there are domains which government and law should not enter and in which there is (to use that excruciatingly imprecise dictum) a "right to be let alone".¹ Any sound theory of natural law will explain and justify the authority of government as an authority limited (1) by positive law (especially but not only constitutional law), (2) by the moral principles and norms of justice which apply to all human action (whether private or public), and (3) by the common good of political communities—a common good which I shall argue is inherently instrumental and therefore limited. If "limited government" is not a term widely used in natural law theories, it is because it is so ambiguous. For the proper limits on government and political authority are quite various in their kinds and their sources. Nonetheless, being "limited" is only to a limited extent a desirable

* Professor of Law and Legal Philosophy, University of Oxford; Fellow of University College, Oxford; Distinguished Visiting Professor, Boston College Law School, 1993-94; Fellow of the British Academy.

1. THOMAS M. COOLEY, *TORTS* (2d ed. 1888), p.29; *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *Poe v. Ullman*, 367 U.S. 497, 550 (1961) (Harlan J., dissenting); *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

characteristic of government: bad and powerful people and groups want government limited so that they can bully and exploit the weak, or simply enjoy their wealth untroubled by care for others. So "limited" cannot be a *framework term*, like "just."

I hope you will forgive me if I suggest that the thirteenth century theologian Thomas Aquinas was the first theorist of government to articulate as a specific concept the desideratum that governmental authority/power be legally "limited." (But these questions of priority are not to be taken too seriously). As a philosopher he began a commentary on Aristotle's *Politics*, and on its first substantive page he gives an explanation of a distinction which Aristotle at that point draws but does not explain, the distinction between *political* and *regal* types of government (*regimen*). In "regal" (kingly) forms of government, says Aquinas, the rulers have plenary authority,² while in "political," their authority is "limited [*coarctata*] in accordance with certain laws of the polity."³

Why limit the authority of rulers? Well, Aquinas's uncompleted commentary ends before the passages where Aristotle discussed the desirability of a "rule of laws and not of men."⁴ But in his commentary on Aristotle's *Ethics*, at the point in Book I-V where Aristotle briefly summarizes the merits of the rule of law,⁵ Aquinas expands and perhaps deepens the summary a little: right government does not tolerate an unregulated rule by rulers ("rule of men"), but calls for rulers to be ruled by law, precisely because law is a dictate of *reason*, while

2. See also THOMAS AGVINAS, SUMMA THEOLOGIAE I-II q.105 a.1 ad 2.

3. "... politicum autem regnum est quando ille qui praeest habet potestatem coarctatam secundum aliquas leges civitatis": AQUINAS, IN LIBROS POLITICORUM ARISTOTELIS EXPOSITIO I, 1 (Marietti ed., 1951, n.13). In his DE REGIMINE PRINCIPUM, I, 6, Aquinas states that where one person is ruler, that person's power/authority should be "limited" (temperetur potestas), lest it slide into tyranny (i.e. into government for private rather than common good). Aquinas's distinction between regal and political rule is enthusiastically taken up by Sir John Fortescue, THE GOVERNANCE OF ENGLAND (c.1475), c.1; likewise his DE NATURA LEGIS NATURAE ["On the nature of natural law"] (c.1462) c.16; similarly his DE LAUDIBUS LEGUM ANGLIAE ["In praise of the laws of England"] (c.1469) cc. 2-4. Thence it finds its way into Coke and the mainstream of English constitutional thought. The first editor of Sir John Fortescue's GOVERNANCE (Lord Fortescue of Credan, when solicitor-general to the Prince of Wales, in 1714) titled the work "THE DIFFERENCE BETWEEN AN ABSOLUTE AND LIMITED MONARCHY." In c.1 of the GOVERNANCE, as elsewhere in his writings on this theme, Fortescue appeals to the authority of Aquinas, explicitly to the DE REGIMINE PRINCIPUM; there is, however, no evidence that he read Aquinas's commentary on the Politics: see CHARLES PLUMMER (ed.), THE GOVERNANCE OF ENGLAND . . . BY SIR JOHN FORTESCUE . . . 172-3 (Oxford U.P., 1895).

4. E.g. ARISTOTLE, POLITICS III,10: 1286a9, etc.

5. ARISTOTLE, NICOMACHEAN ETHICS V,6: 1134a35-b1.

what threatens to turn government into tyranny (rule in the interests of the rulers) is their human *passions*, inclining them to attribute to themselves more of the good things, and fewer of the bad things, than is their fair share. And the commentary on the *Politics* suggests another reason. Political (as opposed to despotic government) is the leadership of free and equal people; and so the roles of leader and led (ruler and ruled) are swapped about for the sake of equality, and many people get to be constituted ruler either in one position of responsibility or in a number of such positions.⁶

Such regular change-overs in political office—standardly correlated with elections⁷—obviously need to be regulated by the laws which constitute (define) those offices; those who at any one time hold office accordingly do so “according to law” (*secundum statuta*).⁸ The guiding thought is: “free and equal.” Indeed, in his own free-standing theological works Aquinas will say that the best arrangement of governmental authority (*optima ordinatio principum*) will include this, that “everyone (*omnes*) shares in government, both in the sense that everyone is eligible to be one of the rulers, and in the sense that those who do rule are elected by everyone.”⁹ And those who go beyond constitutional limits by enacting ultra vires laws are thereby acting unjustly;¹⁰ their action is merely another way of getting more than their fair share (in this case, of authority, if of nothing else).

The account of the rationale and content of the *Rechtsstaat* or Rule of Law, and thus of the point and scope of the legal limits on government, has in subsequent centuries become somewhat ampler and more detailed. However, like these early teachings of Aristotle and Aquinas, later accounts enriched by historical experience and the reflections of public lawyers properly pertain to natural law theory, in ways which I hope to make a little clearer in what follows.

6. AQUINAS, IN LIBROS POLITICORUM ARISTOTELIS EXPOSITION I, 5 (Marietti ed., 1951, n.90): “politica est principatus liberorum et aequalium: unde commutantur personae principantes et subiectae propter aequalitatem, et constituuntur etiam plures principatus vel in uno vel in diversis officiis.”

7. See *ibid.* n.152.

8. *Id.*

9. AQUINAS, SUMMA THEOLOGIAE I-II, q.105 a.1c. On sharing in government as the essence of citizenship, see AQUINAS, IN LIBROS POLITICORUM ARISTOTELIS EXPOSITIO III, 1 (Marietti ed., 1951, n.354).

10. This one form of unjust law (and so more a matter of violence than of law properly understood): AQUINAS, SUMMA THEOLOGIAE I-II q.96 a.4c.

II.

Deeper and more demanding than any constitutional or other legal limits on governments are the moral principles and norms which natural law theory considers to be principles and norms of reason,¹¹ and which are limits, side-constraints, recognized in the conscientious deliberations of every decent person. The public responsibilities and authority of rulers do not exempt them from these limits:¹² no intentional killing of the innocent; no rape; no lies; no non-penal enslavement, and so forth. The reassertion of the truths that there are indeed such limits on government, and that they can well be articulated in the relatively modern language of truly inviolable rights, is one of the principal teachings in the papal encyclical *Veritatis Splendor*, and as, you may be surprised to hear, the first attempt the highest teaching authority of the Roman Catholic Church has ever made to "set forth in detail the fundamental elements of Christian moral teaching."¹³ The justification of the traditional claim that these are truths which both pertain to divine revelation and are accessible to reason unaided by revelation would be matter for another lecture, or series of lectures. I have done something towards that project in the last four chapters of my book with Joseph Boyle and Germain Grisez, *Nuclear Deterrence, Morality and Realism*¹⁴ and in my little more recent book *Moral Absolutes*.¹⁵ Matter for another lecture would also be the claim made in the papal letter that "the commandments of the second table of the Decalogue in articular—those which Jesus quoted to the young man of the Gospel (cf

11. See PLATO, REPUBLIC IV, 444d; IX, 585-6 on acting according to reason and thus according to nature. More explicitly, AQUINAS, SUMMA THEOLOGIAE I-II q.71 a.2c: "The good of the human being is being in accord with reason, and human evil is being outside the order of reasonableness So human virtue . . . is in accordance with human nature just in so far as it is in accordance with reason, and vice is contrary to human nature just in so far as it is contrary to the order of reasonableness."

12. "The same law of nature that governs the life and conduct of individuals must also regulate the relations of political communities with one another . . . Political leaders . . . are still bound by the natural law . . . and have no authority to depart from its slightest precepts": JOHN XXIII, ENCYCLICAL PACEM IN TERRIS (1963, part III, paras. 80-81. See JOHN FINNIS, JOSEPH M. BOYLE, JR. & JERMAIN GRISEZ, NUCLEAR DETERRENCE, MORALITY AND REALISM 205 (Oxford U.P., 1987).

13. ENCYCLICAL LETTER VERITATIS SPLENDOR REGARDING CERTAIN FUNDAMENTAL QUESTIONS OF THE CHURCH'S MORAL TEACHING, dated 6 August 1993, sec. 115. The treatment of inviolable human rights, based on the moral norms exceptionlessly prohibiting intrinsically evil kinds of act centres on secs. 95-101.

14. FINNIS, BOYLE & GRISEZ, *supra* note 12.

15. JOHN FINNIS, MORAL ABSOLUTES: TRADITION, REVISION AND TRUTH (Catholic University of America Press, Washington DC, 1991), especially pp. 1-83.

Mt. 19:19)—constitute the indispensable rules of all social life.”¹⁶ In my paper in Robert George’s recent collection *Natural Law Theory*,¹⁷ I make a similar claim about the backbone of the legal system being the exceptionless norms which exclude intentionally killing the innocent, intentionally harming, lying, and so forth, and in *Moral Absolutes* I say what I know about the place of the Ten Commandments in the Christian dispensation. Here I shall say no more about this very important matter.

III.

The government of political communities is rationally limited, not only (1) by constitutional law and (2) by the moral norms which limit every decent person’s deliberation and choice, but also (3) by the inherent limits of its general justifying aim, purpose or rationale. That rationale I follow the tradition of natural law theory in calling the “common good” of the political community. And that common good is not basic, intrinsic or constitutive, but rather is instrumental. This is something which I have not made clear in my published reflections on natural law theory. How should it be explained? Every community is constituted by the communication and cooperation between its members. To say that a community has a common good is simply to say that that communication and cooperation has a point which the members more or less concur in understanding, valuing and pursuing. How does a critical political theory go about identifying, explaining and showing to be fully reasonable the various types of intelligible point or common good, and thus the various fully reasonable types of human community? It can do so only by going back to first principles. And the first principles of all deliberation, choice and action are the basic *reasons for action*. What gives reason for action is always some intelligible benefit which could be attained or instantiated by successful action, benefits such as the following seven. Each is a basic, irreducible form of human opportunity, good for its own sake. There is (1) *knowledge* (including aesthetic appreciation) of reality; (2) *skillful performance*, in work and play, for its own sake; (3) *bodily life* and the component aspects of its fullness: health, vigour and safety; (4) *friendship* or harmony and association between persons in its various forms and strengths; (5) the sexual association of a man and a woman which, though it essentially involves both friendship between the partners and the procreation and education

16. VERITATIS SPLENDOR § 97.

17. NATURAL LAW AND LEGAL REASONING in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 134-57 (Robert P. George ed., Clarendon Press, Oxford, 1992).

of children by them, seems to have a point and shared benefit that is irreducible either to friendship or to life-in-its-transmission and therefore (as comparative anthropology confirms and Aristotle came particularly close to articulating,¹⁸ not to mention the "third founder" of Stoicism, Musonius Rufus) should be acknowledged to be a distinct basic human good, call it *marriage*; (6) the good of harmony between one's feelings and one's judgments (inner integrity), and between one's judgments and one's behavior (authenticity), which we can call *practical reasonableness*, and lastly (7) *harmony with* the widest reaches and most *ultimate source* of all reality, including meaning and value. The propositions that pick out such basic human goods precisely as giving (underived, non-instrumental) reason for action to instantiate those goods, and for avoiding what threatens to destroy, damage or impede their instantiation, are propositions called by Aquinas the first principles of natural law or natural right¹⁹—natural, not because they are principles deduced from some prior theoretical account of human nature, but rather because precisely by one's originally practical understanding of these aspects of human flourishing and fulfillment, one comes both to realize (make actual in practice) and reflectively and theoretically to understand the nature of the sort of being (the human person, *homo*) who is fulfilled in these ways.²⁰ With all this in mind, let me go back to the question of the basic types of *common* good and human community. There are three types of common good which each provide the

18. Everyone knows and few even profess to deny Aristotle's teaching that people are by nature social and indeed political animals. Many fewer seem aware of his teaching (NICOMACHEAN ETHICS VIII.12: 1162a15-29) that people are by nature even more primarily conjugal.

19. AQUINAS, SUMMA THEOLOGIAE I-II q.94 aa.2c, 3c.

20. On the fundamental but often overlooked Aristotelian and Thomistic methodological axiom, that natures are understood by understanding capacities, and capacities by understanding their actuations, and acts by understanding their objects (and on the basic human goods as the objects of acts of will), see JOHN FINNIS, FUNDAMENTALS OF ETHICS, 21-22 (Georgetown U.P., 1983). A further methodological note may be in place. Although the worth of all these types of intrinsic benefit, of basic human good, is obvious, a reflective account of them can and should be discursive and critical, assembling reminders of the experience, practices and institutions which evidence the intelligibility and point of these forms of good, and defending the account against doubts and objections. For the inherent self-evidence of some propositions does not preclude a rational defence of them; one argues for such a proposition dialectically, i.e. by relating it to other knowledge, and showing that denying it had rationally unacceptable consequences. Once again one can observe that when Strauss wrote, this work of argumentation and critical dialectic had been only patchily begun; but since then it has been essayed quite vigorously. See JERMAIN GRISEZ, JOSEPH M. BOYLE & JOHN FINNIS, "PRACTICAL PRINCIPLES, MORAL TRUTH AND ULTIMATE ENDS" American J. Jurisprudence 32, 99-148 (1987) and bibliography at 14-151; Robert P. George, *Recent Criticism of Natural Law Theory*, U. CHI. L. REV. 55, 1371-1429 (1988).

constitutive point of a distinctive type of open-ended community and directly instantiate a *basic* human good: (i) the affectionate mutual help and shared enjoyment of the friendship and *communio* of "real friends;" (ii) the sharing of husband and wife in married life, united as complementary, bodily persons whose activities make them apt for parenthood—the *communio* of spouses and, if their marriage is fruitful, their children; (iii) the *communio* of religious believers cooperating in the devotion and service called for by what they believe to be the accessible truths about the ultimate source of meaning, value and other realities, and about the ways in which human beings can be in harmony with that ultimate source. Other human communities *either* are dedicated to accomplishing a specific goal or set of goals (like a university or hospital) and so are not in the open-ended service of their members, *or* have a common good that is instrumental rather than basic. One should notice that association and cooperation, even when oriented towards goals that are both specific and instrumentally rather than basically and intrinsically good (as, *e.g.*, in a business enterprise), have a more than merely instrumental character in as much as they instantiate the basic good of friendship in one or other of its central or non-central forms.

Thus, the political community—properly understood as one of the forms of collaboration needed for the sake of the goods identified in the first principles of natural law—is a community cooperating in the service of a common good that is instrumental, not itself basic. True, it is a good that is great and godlike²¹ in its ambitious range: "to secure the whole ensemble of material and other conditions, including forms of collaboration, that tend to favour, facilitate, and foster the realization by each individual [in that community] of his or her personal development"²² (which will in each case include, constitutively, the flourishing of the family, friendship and other communities to which that person belongs). True too, its proper range includes the regulation of friendships, marriage, families, and religious associations, as well as of all the many organizations and associations which, like the state itself, have only an instrumental (*e.g.* an economic) common good. But such regulation of these associations should never (in the case of the

21. ARISTOTLE, NICOMACHEAN ETHICS I,1: 1094b9.

22. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 147. As I indicate, *ibid.* p.160, this account of the common good of the political community is close to that worked out by French commentators on Aquinas in the early mid-twentieth century. A similar account was adopted by the Second Vatican Council: *e.g.* "the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment" (GAUDIUM ET SPES (1965) para. 26; similarly DIGNITATIS HUMANAE (1965) para. 6).

associations with a non-instrumental common good) or only exceptionally (in the case of instrumental associations) be intended to take over the formation, direction or management of these personal initiatives and interpersonal associations. Rather, its purpose must be to carry out a function that the theologians of the early twentieth century taught European politicians and treaty draftsmen of the 1990s to call *subsidiary* (i.e. helping, from the Latin *subsidium*, help)—the function²³ of assisting individuals and groups to coordinate their activities for the objectives and commitments *they* have chosen, and to do so in ways consistent with the other aspects of the common good of this community, uniquely complex and far-reaching in its rationale and peculiarly demanding in its requirements of cooperation, the political community.²⁴

The fundamentally instrumental character of the political common good is indicated by both parts of the teaching about religious liberty by the Second Vatican Council, the great assembly of Catholic bishops from 1962 to 1965. The Council considered its teaching to be a matter of natural law (i.e. of "reason itself").²⁵ The *first* part of the teaching is that everyone has the right not to be coerced in matters of religious belief and practice. For to know the truth about the ultimate matters compendiously called by the Council "religious," and to adhere to and put into practice the truth one has come to know, is so significant a good and so basic a responsibility, and the attainment of that "good of the human spirit"²⁶ is so inherently and non-substitutably a matter of *personal* assent and *conscientious* decision, that if a government intervenes coercively in people's search for true religious beliefs, or in people's expression of the beliefs they suppose true, it will harm those people and

23. See FINNIS, *supra* note 22, at 146-47, 159.

24. Of course, the common good of the political community has important elements which are scarcely shared with any other community within the polity: for example, the restoration of justice by punishment of those who have offended against just laws; the coercive repelling and restraint of those whose conduct (including negligent omissions) unfairly threatens the interests of others, particularly those interests identified as moral ("human") or legal rights, and corresponding compulsory measures to secure restitution, compensation or reparation for violations of rights; the specifying and upholding of a system of holding or property rights which respects the various interests, immediate and vested or remote and contingent, which everyone has in each holding. But the fact that these and various other elements of the political common good are peculiar to the political community and the proper responsibility of its leaders, the government, in no way entails that these elements are basic human goods or that the political common good is other than in itself instrumental.

25. DECLARATION DIGNITATIS HUMANAЕ, para. 2. The Council considered it to be also a matter of divine revelation.

26. It is one of the *animi humani bona* mentioned in *ibid.*, para.1.

violate their dignity even when its intervention is based on the correct premise that their search has been negligently conducted or has led them into false beliefs or both. Religious acts, according to the Council, "transcend" the sphere which is proper to government; government is to care for the temporal common good, and this includes the subsidiary function of acknowledging and fostering the religious life of its citizens; but governments have no responsibility or right to direct religious acts, and "exceed their proper *limits*" if they presume to do so.²⁷

The *second* part of the Council's teaching concerns the proper restrictions on religious freedom, namely those restrictions

required for [i] the effective *protection of the rights* of all citizens and of their peaceful coexistence, [ii] a sufficient care for the authentic *public peace* of an ordered common life in true justice, and [iii] a proper upholding of *public morality*. All these factors constitute the fundamental part of the common good, and come under the notion of *ordre public*.²⁸

Here, too, the political common good is presented as instrumental, serving the protection of human and legal rights, *public* peace and *public* morality—in other words, the preservation of a social environment conducive to virtue. Government is precisely not presented here as dedicated to the promotion of virtue and the repression of vice, even though virtue (and vice) are of supreme and constitutive importance for the well-being (or otherwise) of individual persons and the worth (or otherwise) of their associations.

Is the Vatican Council's natural law theory right? Or should we rather adhere to the uncomplicated teaching of Aquinas's treatise *On Princely Government*, that government should command whatever leads people towards their ultimate (heavenly) end, forbid whatever deflects them from it, and coercively deter people from evil-doing and induce them to morally decent conduct?²⁹ Perhaps the most persuasive short statement of that teaching is still Aristotle's famous attack on theories which like the sophist Lycophron's, treat the state as a mere mutual

27. "Potestas igitur civilis, cuius finis proprius est bonum commune temporale curare, religiosam quidem civium vitam agnoscere eique favere debet, sed limites suos excedere dicenda est, si actus religiosos dirigere vel impedire praesumat": *ibid.*, para.3.

28. *Ibid.*, para.7.

29. DE REGIMINE PRINCIPUM c.14 (. . . ab iniquitate coerceat et ad opera virtuosa inducat). This thesis is qualified, though not abandoned, in other works of Aquinas. Thus SUMMA THEOLOGIAE I-II q.104 a.5c teaches that human government has no authority over people's minds and the interior motions of their wills. *Ibid.* I-II q.96 a.2 teaches that governmental pursuit of virtue should be gradual and should not ask too much of the average citizen (who is not virtuous).

insurance arrangement?³⁰ But in two crucial respects, at least, Aristotle (and with him the tradition) has taken things too easily. *First*: if the object, point or common good of the political community were indeed a self-sufficient life, and if self-sufficiency (*autarcheia*) were indeed what Aristotle defines it to be—a life lacking in nothing, one of complete fulfillment³¹—then we would have to say that the political community has a point it cannot hope to achieve, a common good utterly beyond its reach. For subsequent philosophical reflection has confirmed what one might suspect from Aristotle's own manifest oscillation between different conceptions of *eudaimonia* (and thus of *autarcheia*), that integral human fulfillment is nothing less than the fulfillment of (in principle) all human persons in all communities and cannot be achieved in any community short of the heavenly kingdom, a community envisaged not by unaided reason (natural law theory) but only by virtue of divine revelation and attainable only by supernatural divine gift. To be sure, integral human fulfillment can and should be a conception central to a natural law theory of morality and thus of politics. For nothing less than integral human fulfillment, the fulfillment of all persons in all the basic human goods, answers to reason's full knowledge of, and the will's full interest in, the human good in which one can participate by action. And so the first principle of a sound morality must be: In voluntarily acting for human goods and avoiding what is opposed to them, one ought to choose and will those and only those possibilities whose willing is compatible with integral human fulfillment. To say that immorality is constituted by cutting back on, fettering,

30. . . . the polis was formed not for the sake of life only but rather for the good life . . . and . . . its purpose is not [merely] military alliance for defence . . . and it does not exist [merely] for the sake of trade and business relations . . . any polis which is truly so called, and is not one merely in name, must have virtue/excellence as an object of its care [peri aretes epimeles einai: be solicitous about virtue]. Otherwise a polis sinks into a mere alliance, differing only in space from other forms of alliance where the members live at a distance from each other. Otherwise, too, the law becomes a mere social contract [syntheke: covenant]—or (in the phrase of the sophist Lycophron) 'a guarantor of justice as between one man and another'—instead of being, as it should be, such as will make [poiein] the citizens good and just The polis is not merely a sharing of a common locality for the purpose of preventing mutual injury and exchanging goods. These are necessary preconditions of the existence of a polis . . . but a polis is a communio [koinonia] of clans [and neighborhoods] in living well, with the object of a full and self-sufficient [autarkous] life . . . it must therefore be for the sake of truly good (kalon) actions, not of merely living together . . . ARISTOTLE, *POLITICS* III.5: 1280a32, a35, 1280b7-13, b30-31, b34, 1281a1-4.

31. ARISTOTLE, *NICOMACHEAN ETHICS* I, 7:1097b. This, incidentally, differs widely from what STEPHEN MACEDO, *LIBERAL VIRTUES* 215-17 (Clarendon Press, Oxford, 1990), means by "an autarchic person."

reason by passions is equivalent to saying that the sway of feelings over reason constitutes immorality by deflecting one to objectives not in line with integral human fulfillment. This ideal community is thus the good will's most fundamental orientating ideal, but it is not, as early natural law theories such as Aristotle's prematurely proposed, the political community.

Secondly: when Aristotle speaks of "making" people good, he constantly³² uses the word *poiesis* which he has so often contrasted with *praxis* and reserved for techniques ("arts") of manipulating matter. But helping citizens to choose and act in line with integral human fulfillment must involve something which goes beyond any art or technique. For only individual acting persons can by their own choices make themselves good or evil. Not that their life should or can be individualistic; their deliberating and choosing will be shaped, and helped or hindered, by the language of their culture, by their family, their friends, their associates and enemies, the customs of their communities, the laws of their polity, and by the impress of human influences of many kinds from beyond their homeland. Their choices will involve them in relationships just or unjust, generous or illiberal, vengeful or charitable, with other persons in all these communities. And as members of all these communities they have some responsibility to encourage their fellow-members in morally good and discourage them from morally bad conduct.

To be sure, the political community is a cooperation which undertakes the unique tasks of giving coercive protection to all individuals and lawful associations within its domain, and of securing an economic and cultural environment in which all these persons and groups can pursue their own proper good. This common good of the political community makes it far more than a mere arrangement for "preventing mutual injury and exchanging goods." But it is one thing to maintain, as reason requires, that the political community's rationale requires that its public managing structure, the state, should deliberately and publicly identify, encourage, facilitate, and support the truly worthwhile (including moral virtue), should deliberately and publicly identify, discourage, and hinder the harmful and evil, and should by its criminal prohibitions and sanctions (as well as its other laws and policies) assist people with parental responsibilities to educate children and young people in virtue and to discourage their vices. It is another thing to maintain that rationale requires or authorizes the state to direct people to virtue and deter them from vice by making even secret and truly consensual adult

32. Apart from the passage just cited, see ARISTOTLE, NICOMACHEAN ETHICS I,10: 1099b32; II,1: 1103b4; X,9: 1180b24.

acts of vice a punishable offense against the state's laws.³³ There was a sound and important distinction of principle which the Supreme Court of the United States overlooked in moving from *Griswold v. Connecticut*, 381 US 479 (1965) (*use of contraceptives by spouses*) to *Eisenstadt v. Baird*, 405 US 438 (1970) (*public distribution of contraceptives to unmarried people*).³⁴ The truth and relevance of that distinction would be overlooked again if laws making sodomy between adults an offense were to be struck down by the Court on any ground which would also require the law to tolerate the advertising or marketing of homosexual services, the maintenance of places of resort for homosexual activity, or the promotion of homosexualist "lifestyles" via education and public media of communication, or to recognize homosexual "marriages" or permit the adoption of children by sexually active homosexuals, and so forth.³⁵

IV.

As I said at the beginning, it is a mistake of method to frame one's political theory in terms of its "liberal" or "non-liberal" (or "(anti-)conservative" or "(non-)socialist" or "(anti-)capitalist") character. Fruitful inquiry in political theory asks and debates whether specified principles, norms, institutions, laws and practices are "sound," "true," "good," "reasonable," "decent," "just," "fair," "compatible with proper freedom," and the like—not whether they are liberal or incompatible with "liberalism."³⁶ Still, many who style their own thought liberal offer to

33. So a third way in which Aristotle takes things too easily is his slide, at NICOMACHEAN ETHICS X.9:1180a1-3, from upholding government's responsibility to assist or substitute for the direct parental discipline of youth, to claiming that this responsibility continues, and in the same direct coercive form, "to cover the whole of a lifetime, since most people obey necessity rather than argument, and punishments rather than the sense of what is truly worthwhile."

34. The law struck down in *Griswold* was the law forbidding use of contraceptives even by the married persons; *Griswold's* conviction as an accessory to such use fell with the fall of the substantive law against the principals in such use. Very different, in principle, would have been a law directly forbidding *Griswold's* activities as a public promoter of contraceptive information and supplies. If U.S. constitutional law fails to recognize such distinctions, it shows its want of sound principle.

35. On the reasons for judging homosexual sex acts to be morally wrong, see John Finnis, *Law, Morality and "Sexual Orientation,"* — NOTRE DAME L. REV. — (1994).

36. Enquiries framed in the latter way enmesh the would-be theorist in the shifting contingencies of political movements or programmes which, taken in their sequence since the term "liberal" emerged in political use in the 1830's, having virtually nothing significant in common and, as movements, no principle for identifying a central case of focal sense. The only sensible way to deal with philosophical claims framed in terms of liberalism, liberal political institutions, etc., is to treat them as rhetorical code for "sound,"

identify limits on government which go beyond those I have sketched above. So we can usefully ask whether these limits suggest a conception of limited government which natural law theory would be wrong to reject or overlook. One proposal is that government not constrain liberty on the ground that one conception of what is good or right for individuals is superior to another. This proposal has been put forward by the later Rawls as appropriate for nearly-just, modern, constitutional democracies such as he takes ours to be. But this same latter-day Rawls abstains from claiming that his theory is true, valid, or sound; it is advanced instead as suitable to ensure stability and social unity from one generation to the next, by bringing about or maintaining an "overlapping consensus" on certain constitutional principles (notably this one).³⁷ To claim validity or truth for his theory, or the principles it promotes, would (Rawls claims) violate the conditions of pluralism and (as other "liberals" put it) "neutrality" and to move from the proper domain of political theory and practice into the domain of private ideals and conceptions of the good—from public reasons for action to private reasons. Ronald Dworkin, on the other hand, has proposed that the requirement of government neutrality between conceptions of good and bad ways of life is an implication of a true political principle, that everyone is entitled to equal concern and respect.

Rawls' refusal to offer any (further) justification for these principles has attracted devastating criticism from Joseph Raz,³⁸ and others.³⁹ The essential point, in my opinion, is that any position like Rawls' postulates or presupposes an untenable distinction between public and private reasons for action, since, like Rawls, the position will admit that in one's private deliberations, unlike public deliberations, one may and doubtless should be motivated by a conception of good and bad lives, a conception which one considers true. The untenability of this distinction is evident. For every political actor/agent is a human person or at least, in the case of the social acts of groups (states, corporations, teams . . .), has no existence apart from the personal acts of the people who are the group's leaders and/or other members. Each person's reasons for choosing to perform some political act must be, or at least be based upon, reasons which for that person are ultimate/basic (in need of no further

"true," "warranted," "just" or the like; one translates accordingly and carries on with the consideration of the arguments on their merits.

37. See the expository discussion of Rawls in Joseph Raz, *Facing Diversity: The Case of Epistemic Diversity*, *PHILOSOPHY & PUBLIC AFFAIRS* 19, 3-46, at 12 (1990).

38. See *supra* note 37 (the article also effectively criticises analogous proposals made by Thomas Nagel).

39. MACEDO, *LIBERAL VIRTUES* 53, 55, 60-64.

rationality motivating and thus justifying reason); and these reasons must all be consistent with the acting person's other reasons or principles of action. For one's public acts are at the same time one's private acts—they are part of one's one and only real life. One's engagement in a "political" act must be not merely not logically inconsistent with one's conception of a good and decent life; it must actually be rationally motivated by that conception (which after all can be nothing other than one's conception of what are good reasons for one's acting). So one's "public" reasons for acting must also be one's "private" reasons (though it does not follow that all one's reasons for action need be "made public"). Moreover, political actions often have the gravest consequences both for the actor and for others; so, the public reasons are not good (adequate) reasons unless they justify the act, all the way down—justify the actor in *doing* it. To postulate that political acts are all to be *done* for reasons publicly undiscussable ("private ideals") is to propose that the political order should refuse to offer its participants *any* good (adequate) reason for participating in it or for accepting the burdens of citizenship.

What about Ronald Dworkin's attempts to derive a constraint of neutrality from the "principle of equal concern and respect?" Constraining people's actions on the basis that the conception of the good that if done in good faith, those actions put into effect is a bad conception, *may* manifest, not contempt, but rather a sense of the equal worth and human dignity of those people; the outlawing of their conduct may be based simply on the judgment that they have seriously misconceived, and are engaged in degrading, human worth and dignity, including their own personal worth and dignity along with that of others who may be induced to share in or emulate their degradation. In no field of human discourse or practice should one equate the judging persons who are mistaken and who act upon that judgment, with despising those persons or preferring those who share one's judgment.⁴⁰ After 1980 Dworkin revised his argument. Equality of concern and respect is violated, he contended, whenever sacrifices or constraints are imposed on citizens in virtue of an argument they could not accept without abandoning their sense of their equal worth. For "no self-respecting person who believes that a particular way to live is most valuable for him can accept that this way of life is base or degrading."⁴¹ But this argument is as impotent as its forerunners. To forbid people's preferred conduct does not require them to "accept an argument." If they did accept the argument on which the law is based, they would be accepting that their

40. See FINNIS, *supra* note 22, at 221-23.

41. RONALD DWORKIN, A MATTER OF PRINCIPLE 206 (Harvard U.P., 1985).

former preferences were indeed unworthy of them or, if they had always recognized that, but had retained their preferences nonetheless, it would amount to an acknowledgment that they had been unconscientious. People can come to regret their previous views and conduct, so one must not identify persons, and their worth as human beings, with their current conception(s) of human good. In sum, either those whose preferred conduct is legally proscribed come to accept the concept of human worth on which the law is based, or they do not. If they do, there is no injury to their self-respect; they realize that they were in error, and may be glad of the assistance which compulsion lent to reform (*ie.* drug addicts). If they do not come to accept the law's view, the law leaves their self-respect unaffected; they will regard the law, rightly or wrongly, as pitifully and damagingly mistaken in its conception of what is good for them. They may profoundly resent the law. What they cannot accurately think is that a law motivated by concern for the good, the worth and the dignity of everyone without exception, does not treat them as an equal.⁴² Dworkin has tried to move the argument along further. A careful, fair, and decisive summation and critique of these developments can be found in Robert George's fine new book, *Making Men Moral: Civil Liberties and Public Morality*.⁴³

I now turn, instead, to a proposal more recent and more cautious than either Rawls' or Dworkin's. Stephen Macedo rejects the claim that liberal justice is neutral among human goods or ways of life.⁴⁴ But government should do nothing disrespectful of its subjects, and respect for persons requires, he argues, that citizens be subjected to only publicly justifiable constraint. "People may rightly be coerced by the state only for certain limited reasons,"⁴⁵ namely, *public* reasons, "reasons that all ought to be able to accept."⁴⁶

Thus stated this limit is one which a natural law theorist will gladly accept. Natural law theory is nothing other than the account of all the reasons-for-action which people ought to be able to accept, precisely because these are good, valid, and sound as reasons. But Macedo, here following Rawls, proposes to interpret the limit differently: . . . *public* moral justification . . . does not aim to identify what are simply the best

42. See John Finnis, *Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433, at 437-38 (1987).

43. ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 83-109 (Clarendon Press, Oxford, 1993).

44. MACEDO, *LIBERAL VIRTUES* 265.

45. *Ibid.*, 263.

46. *Ibid.*, 195; cf. 41: "that all reasonable people should be able to accept."

reasons, where best is a function of only the quality of the reasons as reasons leaving aside the constraints of wide accessibility.⁴⁷

Now this is not a crude appeal to majority rule. It is intended as a substantive principle, limiting government action even where a majority support the action. For such a support is sometimes based not on reasons but on respect for tradition or mere uncritical *mores*. In such a case, despite the fact that a law or other governmental action has majority support and is in truth supported by the best reasons, the limit which Macedo proposes would be transgressed—and those subjected to the law would be treated without due respect—if the reasons supporting the action, though sound and true, involve “very difficult forms of reasoning.”⁴⁸ The rational justification for the government’s action must be “accessible to people as we know them.”⁴⁹ But, he goes on, in a natural law theory such as Aquinas’s or the new classical theory of Grisez, Boyle, Finnis, George and others, there is a gap between first principles and specific moral norms such as we find in the Decalogue, a logical space which must be filled by inferences *some* of which “require a wisdom or reasonableness ‘not found in everyone or even in most people.’”⁵⁰

So, Macedo concludes, relevant parts of the natural law, even if true, or at least the inferences, even if sound, on which they depend, may be “beyond the capacities of ‘most people’” and therefore not proper grounds for law.⁵¹

But in fact these natural law theorists do not admit that the actual norms of the Decalogue, or even the inferences on which they rationally depend, are beyond the *capacities* of most people, or that they are inaccessible, or that they *cannot* be appreciated by most people. Throughout his work, Macedo ignores the distinction between native and formed capacity, between faculty and competence—the fact that I both *do* and *do not* have the capacity to speak Icelandic. And in each of the passages which Macedo implicitly relies upon, Aquinas says that the precepts of the Decalogue can be known from first principles with only

47. *Ibid.*, 50.

48. *Ibid.*, 46; also 48 (“excessively subtle and complex forms of reasoning”), 63-64 (“too complex to be widely understood, or otherwise incapable of being widely appreciated by reasonable people”).

49. *Ibid.*, 43.

50. *Ibid.*, 212; the internal quotation is from FINNIS, “PERSONAL INTEGRITY, SEXUAL MORALITY AND RESPONSIBLE PARENTHOOD,” *RIVISTA DI STUDI SULLA PERSONAL E LA FAMIGLIA: ANTHROPOS (NOW ANTHROPOTES)* 1, 43 at 52 (1985), which in turn is citing and summarizing AQUINAS, *SUMMA THEOLOGIAE* I-II q.100 aa. 1c, 11c.

51. MACEDO, *LIBERAL VIRTUES* 212.

a little reflection⁵² and even ordinary folk can make the inference to them and see their point,⁵³ though it can happen that some people get confused about them;⁵⁴ other moral norms, inferable from the precepts of the Decalogue, are ones which *are known (cognoscuntur)*⁵⁵ by the wise rather than by others, who, unlike the wise, *do not* diligently consider the relevant circumstances.⁵⁶ So even on the face of the texts, there is no admission that the moral principles of the Decalogue are outside the domain of "public justification" and public "accessibility."⁵⁷

I want to conclude by taking up one of the two main issues on which Macedo brings his proposed limit to bear. Macedo argues that governments should limit their protection of the unborn by a "principled moderation" which demands that those with the best case should "give something" to those who have put up a "case that is very strong." For, he says, "[t]here are . . . many reasonable arguments on both sides of the abortion debate . . . and it is easy to see how reasonable people can come down on either side [A]bortion . . . seems to come down to a fairly close call between two well-reasoned sets of arguments."⁵⁸

But Macedo's proposal unreasonably assumes a dialectical symmetry which in reality does not hold. For if the better case is that what the abortions in dispute deliberately seek to kill are living human persons, then, however "well reasoned" the contrary arguments may be, it will be a grave wrong to the unborn that the right to deliberately kill them is the "something" to be "given" away to show our "respect" for people who had denied the reality of the unborn's existence, nature, and rights. But if the better case were some contrary (what?), then the loss of "autonomy" or "liberty" given away to honor the pro-life reasoners would involve no deliberate assault on mothers but merely an extension of those restrictions on intentionally destructive individual action which are the

52. AQUINAS, *SUMMA THEOLOGIAE* I-II q.100, a.3c: "modica consideratione."

53. a.11c: "quorum rationem statim quilibet, etiam popularis potest de facili videre."

54. a.11c: "circa huiusmodi contingit iudicium humanum perverti."

55. a.3c.

56. a.1c: "quas considerare diligenter non est cuiuslibet sed sapientum".

57. Admittedly, large numbers of people can get confused even about one or another norm of the Decalogue, as (Aquinas remarks) the Germans encountered by Julius Caesar were morally confused about robbery. AQUINAS, *SUMMA THEOLOGIAE* I-II q.94 a.4c. The conventions of a culture, reinforced by self-interest and a habit of following some passion, can obscure many people's understanding of a moral norm, deflecting rational inference by alluring images and by sophisticated objections and rationalizations engendered by intelligence in the service of feeling. Moreover, what is principle and what conclusion, and how they are related, can be outside the habits of reflection and powers of articulation of many who nonetheless, given time and skilful dialectic, could be brought to a reflective and articulate grasp of them.

58. MACEDO, *LIBERAL VIRTUES* 72.

very first duty of government and the very basis of the common good. So there is no symmetry, and in this matter the responsibility of governments is to reach the right answer.

Indeed, a government which attends strictly to the arguments and is not distracted by the numbers and respectability of those who propose them, will find that (apart from the question whether killing is intended in cases where the pregnancy itself threatens the mother's life) the issue is not even a close call. Pro-choice arguments on abortion, however well-reasoned, nicely fit Macedo's description: arguments *based* on sheer prejudice (in this case, rationalizing the self-preference of men and women). They yield conclusions which, as he says about "racism" and anti-Semitism, we should not wish to compromise with but should, as a community, approach "with resoluteness rather than moderation." For there are fundamental matters in which a sound theory of government is indeed incompatible with limitations based on an appeal to "principled moderation" rather than to truth.